

Pages 1 - 33

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Sallie Kim, Magistrate Judge

UNITED STATES OF AMERICA,) No. 3:15-mj-70856-WHO-1(SK)
)
Plaintiff,)
)
v.)
)
ADAM SHAFI)
)
Defendant.)
_____)

San Francisco, California
Tuesday, December 22, 2015

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL
ELECTRONIC SOUND RECORDING - FTR 2:10-2:48; 2:57-3:01

APPEARANCES:

For United States of America:

U.S. Attorney's Office
White Collar Crime
450 Golden Gate Avenue, 11th Floor
San Francisco, CA 94102

BY: CANDACE KELLY, AUSA

For Defendant:

Joshua L. Dratel, PC
29 Broadway, Suite 1412
New York, NY 10006

BY: JOSHUA LEWIS DRATEL, ESQ.

Law Office of Erik Levin
2001 Stuart Street
Berkeley, CA 94703

BY: ERIK B. LEVIN, ESQ.

Transcribed by Kelly Polvi, Contract Transcriber, utilizing
court reporting and transcription hardware and software.

1 TUESDAY, DECEMBER 22, 2015

2:10 P.M.

2 P R O C E E D I N G S

3 ---000---

4 THE CLERK: Calling criminal matter 15-582, the
5 United States versus Adam Shafi.

6 THE COURT: In the audience, you cannot communicate with
7 the defendant. I just want to warn you now. The court
8 security officer should have told you that, but I just want to
9 let you know again. It's just disruptive; it's distracting.
10 Okay? No waving; no talking. Okay?

11 MS. KELLY: Good afternoon, Your Honor, Candace Kelly on
12 behalf of the United States.

13 THE COURT: Good afternoon.

14 MR. DRATEL: Good afternoon, Your Honor, Joshua Dratel,
15 Erik Levin for Mr. Shafi, who's standing beside us.

16 THE COURT: Thank you.

17 So I understand that we're on for a motion for release
18 from detention. And first I will hear from the government and
19 then I'll hear from defense counsel.

20 MS. KELLY: Your Honor, this is a presumption case and it
21 is a presumption case which means that the presumption is for
22 detention because it involves a crime involving terrorism.

23 And in this case it's material support of terrorism. And
24 there are many ways to commit material support of terrorism.
25 It could be sending funds; it could be sending equipment.

1 In this case, it's someone who is trying to -- was trying
2 to commit himself to the cause of Al-Nusrah Front.

3 And I think that it's important -- and I regret that I
4 did not include this in my papers -- to make sure it's clear
5 what Al-Nusrah Front is, which is, it is a designated terrorist
6 organization by the state department.

7 I think in this culture right now in this country there's
8 a lot of understanding of ISIS or ISIL and -- because they're
9 in the news more often. But I think it's very important to be
10 clear that Al-Nusrah Front is al-Qaeda's affiliate in Syria.

11 And that was determined by al-Zawahiri, who is the
12 leader, emir of al-Quada, who designated Julani, who is the
13 emir of Al-Nusrah Front. And as the Court may recall from the
14 papers, Julani is the emir whose two-hour interview the
15 defendant was listening to before he had a conversation with
16 his friend, S.K., about how he loved that emir and how he
17 believed in the emir's cause and his approach to jihad and
18 his --

19 And through the course of that, and using the defendant's
20 understanding -- as opposed to the government's understanding
21 of that organization, it's an organization that believes that
22 America is the enemy, and they are committed to creating a
23 place where it is ruled by Allah's rule and nothing else, and
24 that America is the enemy and they are --

25 As opposed to, as the defendant was very -- clearly had

1 studied this and was understanding the difference between ISIS
2 and Al-Nusrah Front through his conversation, ISIS -- which, by
3 the way, al-Zawahiri, who is the emir of al-Quada, ordered ISIS
4 to leave Syria and go back to Iraq because he had designated
5 Al-Nusrah Front as the affiliate of al-Quada in Syria.

6 That they do -- ISIS does have a more violent approach to
7 the same cause, which is America is the enemy and they're
8 fighting against that, and America -- Americans are all
9 infidels.

10 So I think it's important -- I pulled a couple of things
11 that government officials have said about Al-Nusrah Front in
12 terms of just making sure that it's clear that just because
13 ISIS is more popular in the media and may have more violence
14 that's a more violent approach, Al-Nusrah Front is just a more
15 selective approach.

16 Just in the year -- because this was the fact that I was
17 able to pull from government sources -- the year 2011 to 2012,
18 Al-Nusrah Front had claimed responsibility for nearly 600
19 attacks. And those included suicide attacks, small arms
20 attacks, IED attacks. And just this year the director of the
21 National Counterterrorism Center was testifying before the
22 Senate Select Committee on Intelligence and he said that
23 Al-Nusrah Front was one of the most capable groups within Syria
24 and has mounted suicide, explosive, and firearms attacks
25 against regime and security targets across the country. It has

1 also sought to provide limited public service and governments
2 to the local population and areas under its control.

3 So just as -- just to sort of set the stage in terms of
4 why this is a preponderance -- why this is a presumption case
5 and what Al-Nusrah Front is really all about, I wanted to make
6 sure that was on the record.

7 The government's position with respect to Mr. Shafi is
8 that there is far more than a preponderance of evidence --
9 which is the standard -- for risk of flight. This is not a
10 situation where there's really a lot of doubt. Because this
11 would be -- there's already been a dry run.

12 This family, who clearly understands the gravity of the
13 situation, given the facts of what's going on in Syria, if they
14 were fearing that their son was going to join a terrorism
15 group, which is what his father said to the U.S. Embassy
16 officials back in August of 2014 when he slipped away from
17 their family vacation, he went in immediately and said, "I am
18 afraid that he is being recruited, that he may be doing harm to
19 himself or others. We need to find him quickly." That is a
20 reaction of a father who is fearing for his son's safety,
21 whether it's at his own hands or at the hands of others, if
22 you're going into this situation in Turkey or Syria, which is a
23 violent, very dangerous situation.

24 So his father -- who clearly knew that this was not
25 someone who was just tired of living with his family, he went

1 to the embassy. And he had serious concerns because he knew
2 what he was dealing with. It's a father who had said that he
3 is very protective of his children. He told the FBI that -- in
4 August of 2014, or September, when he was interviewed, that
5 every family member had a GPS tracking app on their phone so
6 they knew where they were at all times.

7 Which I think comes into play this year, when he went
8 to -- when his son went to the airport again.

9 So this is a family that knows, this is a father who
10 encouraged his son to go -- this is after he came back from the
11 first trip -- he encouraged him to go and visit a defendant who
12 was detained down in San Jose, Mr. Harcevic, who defense
13 counsel raised in his papers, because clearly he wanted him to
14 understand the consequences of engaging in this activity, which
15 is trying to go and join one of these groups.

16 Mr. Harcevic was incarcerated for the very same thing:
17 Material support -- not attempted, but he was charged with
18 material support by sending funds to a terrorist organization.

19 And the father, who was working with the FBI and talking
20 with the FBI over the months, said, "I'm not sure it did any
21 good."

22 So here's someone who has tried. He has tried to help
23 him get education; he has tried to help him with employment.
24 His father has his own company. I think his uncle also has a
25 company. They try. And they have a very strong -- it's very

1 clear they have a very strong network of the community and
2 friends and family members. They weren't able to stop this.

3 And this is something that is driven not by -- you know,
4 we've seen a bunch of defendants charged with drug crimes
5 today. They have a very different motivation for the crimes
6 that they commit. And the amount of sureties and the amount of
7 money and their ties to the community are very important and
8 can be overcome by certain conditions that the Court can set.

9 We are dealing with someone who, if the Court has had a
10 opportunity to listen to his discussions about Julani, the emir
11 of Al-Nusrah Front, this is someone who is very committed, to
12 the point of saying he is content to die with them.

13 So leaving his family and perhaps having them lose their
14 house is not really going to change; it's not really changing
15 the circumstances that the family and he were faced with after
16 he came back in August of 2014.

17 So the circumstances are pretty much the same, less, of
18 course, at this point the FBI does not have the resources that
19 they have been expending on this case up until charging.

20 So, you know, obviously there are interceptive phone
21 calls that are in papers. That's a pretty intrusive technique
22 that the FBI had at its disposal, which obviously, as a charged
23 defendant, they don't have that anymore.

24 Not to mention that I think that release is not something
25 that should be ended up being a burden on the FBI to keep the

1 community safe and to protect the national security. That's
2 why they brought these charges to bear.

3 So I think that both through Mr. Shafi's words -- even if
4 the Court were to disregard the reason that he was leaving and
5 separate that from the question of his risk of flight, he wants
6 to leave the United States.

7 He told the FBI that -- when he was talking to them on
8 the -- at the airport on June 30th of this year, he didn't
9 admit where he was going to go, but his story, at the time,
10 was, "Oh, I want to leave. I don't want to be in the
11 United States anymore. I don't believe in the --

12 You know, he cited the gay marriage ruling that had just
13 come down. He didn't want to live in the United States. This
14 is someone who does not want to be living amongst -- as he
15 calls us, the kafir, the American infidels. He wants to live
16 elsewhere.

17 And even if he were to -- so you can even separate the
18 fact that he was going to a terrorist organization in terms of
19 looking at the risk of flight. This is someone who knows his
20 parents are keeping a very careful watchful eye on him, have a
21 GPS on him. He lied to them and told them that he was going to
22 an interview at San Francisco State University when, in fact,
23 he was going to the airport.

24 And once again, if there's any doubt about whether or not
25 the parents were fully aware of his motivation and the

1 seriousness of the threat that he would leave the country to go
2 join a terrorist organization, somehow they knew -- even though
3 he had lied to them and told them he was going to an interview,
4 they knew that he was going to the airport.

5 They called his friend, which is evidenced by the phone
6 call with his friend after the -- after he left the airport,
7 who said, "Oh, yeah, your parents called; they think you left."

8 They talked to a relative, also in the complaint
9 affidavit. And not only did they do that -- the agents
10 informed me that they had called the airport, they had called
11 Mr. Shafi, who was not responding to their calls, he was being
12 paged at SF0.

13 And their choice of trying to deal with this very serious
14 situation where I can only imagine that they feared that their
15 son was going off to do something where he very well may get
16 killed, was to call relatives in Egypt and ask them to go to
17 Istanbul and try to beat his flight so that they could
18 hopefully find him in the airport and stop him from leaving.

19 Now, that not only shows the way that they're dealing
20 with this very serious situation, it also shows an incredibly
21 strong tie to those family members in Egypt, that they believed
22 that they could call someone in Egypt, family members.

23 And granted, they're all -- the parents and uncles are
24 all dual US and Egyptian citizens. If they believed that the
25 family members in Egypt were going to get on a plane and try to

1 stop this young man in Istanbul, that's a pretty serious,
2 strong connection to a foreign country that Mr. Shafi has.

3 Not to mention in the pretrial services report they
4 have -- this family has their own condo in Egypt.

5 So I think there's plenty of opportunities for him to
6 flee and plenty of motivation for him to flee.

7 He has said that, you know, "What am I going to do now?
8 Maybe I should just go to jail," when he was talking to his
9 relative after -- after he was stopped.

10 And in his view, you know, he had been -- this was -- he
11 had received a sign from Allah that he should go. The sign was
12 if he found his passport, he was going to go. And he found his
13 passport, his U.S. passport, and then apparently being stopped,
14 or having the FBI talk to him -- which he voluntarily talked to
15 them -- was evidently another sign that he wasn't going to go.

16 So how is he to join this fight? How is he to support
17 this cause that he believes so strongly in this cause? There
18 are lots of ways, and we've seen it in other cases. There are
19 many ways to support these causes without traveling.

20 So it's either travel to join them or or do something
21 else. And that's an unpredictable threat, that there's no way
22 that this family, despite clearly they have every intention of
23 trying to do the right thing, I mean, separate and apart from
24 not calling law enforcement when they think their son is
25 leaving and taking that responsibility into their own hands,

1 but they simply have demonstrated that they are not capable of
2 countering this really strong belief system.

3 So this is not about money. It's not about greed. It is
4 about a belief system, and it is about the fact that everyone
5 around him, Mr. Shafi, here in this country, is --

6 And by the way, there is a quote in the complaint that
7 says, "What am I going to do, live like everyone else here and
8 betray --

9 And it says unintelligible, but having listened to the
10 calls again it's betray "Muslims."

11 So that's how he feels about living in this country.

12 So there are not a lot of cases that come before this
13 Court where the motivation for the crime itself is to leave the
14 United States.

15 So what can be -- and, that, you know, he certainly has
16 not shown any respect for material wealth, which is very much
17 an American -- it's sort of quintessential America; right? --
18 is wealth and -- material wealth and houses.

19 So a number of people posting their houses may make them
20 more motivated to do what they can, but I don't think there's
21 any greater motivation than trying to stop your son from going
22 somewhere where you think he's going to die.

23 So posting -- they can post all of their many properties
24 and their rental properties and their Egyptian property. I
25 don't think you could find a way to have his parents have a

1 higher motivation than they had.

2 And he certainly has shown that he doesn't have any
3 respect for law enforcement here, for the rules, and, most
4 importantly, for the American way of life.

5 So based on all of those things, I think he is both a
6 flight risk and a danger to the community. Because if, for
7 some reason, he feels that all of the conditions that might be
8 imposed were to thwart his efforts to leave, although he has
9 talked about leaving through Mexico, or going through Egypt,
10 which is "hell-a disorganized," I think is -- to quote -- his
11 words, there are a lot of ways to get out of this country
12 without getting on a plane and without having a passport.

13 So with the right motivation, which I think this young
14 man has, I fear that there is either -- we're going to create a
15 dangerous situation by thwarting that and forcing him to live
16 amongst the kafir and betray Muslims, or we're going to create
17 such a huge incentive to carry out his ultimate plan, which is
18 to get to Al-Nusrah Front and join the fight, I don't think
19 that any of the conditions that have been proposed are
20 sufficient to counter those.

21 **THE COURT:** Thank you, Ms. Kelly.

22 Mr. Dratel?

23 **MR. DRATEL:** Thank you, Your Honor.

24 I know the Court has read the submission, so I'm not
25 going to --

1 **THE COURT:** I've read everything.

2 **MR. DRATEL:** Yes.

3 **THE COURT:** And I've listened to the tapes as well.

4 **MR. DRATEL:** Right. And I understand that, Your Honor.
5 So what I'm going to do is address -- and if I repeat anything
6 in there, it's really in the context of papers that were not
7 addressed in our papers.

8 **THE COURT:** Okay.

9 **MR. DRATEL:** In other words, the government's papers,
10 pretrial services report, and the supplemental papers that we
11 filed yesterday.

12 And just as a threshold matter, the statutory framework
13 and case law deciding it -- interpreting it, the facts of the
14 case are probably the least important in terms of presumption
15 of innocence and not trying the case right now when we are just
16 getting in the case and the government's had, essentially, more
17 than a year of investigation involving this case.

18 So -- but I will discuss those things as they implicate
19 the important issues and the issues that the Court obviously
20 has to address, which is risk of flight --

21 **THE COURT:** Mm-hm.

22 **MR. DRATEL:** -- and danger to the community.

23 So with respect to the pretrial services report, to get
24 to that first, the pretrial services report concludes that
25 there are conditions that could resolve the issue of risk of

1 flight.

2 And we agree, obviously -- and just so that we're clear
3 on a couple of things that the government said today, the
4 intervention by family in Egypt proves the exact opposite:
5 That he does not have refugee agent to avoid this case. They
6 are fully aligned with the family here in the United States to
7 keep him here. So that's not a solution. So it proves the
8 exact opposite than what it government would claim it does.

9 Second, with respect to the pretrial services position on
10 dangerousness, which is that there are conditions, but they
11 feel that there are mental health issues, potentially, that
12 they want evaluated and then want -- prior to addressing it on
13 the merits.

14 And I think that that's a little backward in the sense of
15 how bail works. First of all, the statute, 3142(c)(1)(B)(x) --
16 10 -- one of the conditions is mental health counseling as a
17 condition of bail. The Court can order that as a condition of
18 release. And we encourage the Court to do that. If that's --
19 and the other part is if the mental health issue is the only
20 thing that's an impediment to a conclusion that there are
21 conditions, not only that will not only resolve risk of flight
22 but also dangerousness to the community. And if that's an
23 impediment to release, then order release pending that
24 evaluation, not order detention pending that evaluation. Set
25 the conditions of release.

1 We don't think it's necessary, based on the nature of the
2 statute and all the other factors that we'll go through, but it
3 really is the opposite. You should be ordering release pending
4 that evaluation. We think the evaluation will come after, as a
5 component of the pretrial release.

6 The other part of the aspect of the mental health
7 equation is that the dangerousness aspect of this requires
8 clear and convincing evidence. And that one paragraph of the
9 interview with Mr. Shafi is not clear and convincing evidence
10 of anything. That he considered suicide once or twice or
11 occasionally, he never had a plan to do it, never attempted it.
12 It's not evidence. It's not clear and convincing evidence.

13 Not only that, it's contradicted by all of the other
14 evidence. This is someone without any violence in his history.
15 Literally, he would not hurt a fly. You've read the letters,
16 that cousins say -- friends say, "That's your cousin who
17 wouldn't let us kill the bee. He didn't want to dissect an
18 insect in class. He was allowed to take photographs instead."

19 So in terms of context of dangerousness, the government
20 had him under surveillance from the time he returned. He
21 submitted to interviews. He cooperated. He doesn't have a
22 criminal record.

23 So all of these factors have not evidenced a single
24 violent incident, violent plan, or anything like that.

25 Even as to the airport. Even at the airport. They said

1 he was arrested without incident at his home.

2 **THE COURT:** Mr. Dratel, would you like to discuss the
3 comments that were made in the tape-recordings? Because I did
4 listen to them, and I'm assuming that you listened to them as
5 well.

6 **MR. DRATEL:** Oh, yeah, I have.

7 **THE COURT:** There were some discussions about violence in
8 the tape-recordings. Killing people. Gallons of blood. It's
9 very disturbing.

10 **MR. DRATEL:** Well, you know, some of this stuff, which
11 is -- in terms of blood and all that, I think is about -- you
12 know, there are certain -- there are certain rhetoric.

13 First of all, this country has elevated the concept of
14 violent rhetoric to presidential campaigns. And to use that as
15 a basis for denying bail I think would not be appropriate under
16 the statute or the Unruh standard. People always talk about
17 things that they are never going to do. And they may say,
18 under conditions of anger or frustration, all sorts of things.

19 But it's what they do, if it's violent, that counts. And
20 I don't think there's a single person who's come into court in
21 any context and been either convicted or punished because of
22 what they say.

23 And so in the context --

24 **THE COURT:** I don't actually think that's accurate,
25 Mr. Dratel. I think there are some situations in which people

1 can be criminally convicted for comments. For example, threats
2 can be -- constitute criminal conduct, so.

3 MR. DRATEL: But we don't have those kinds of threats
4 here. Those are very specific threats against very specific
5 people and we don't have those here.

6 THE COURT: I'm concerned about the threats here and the
7 tape-recordings that I heard.

8 MR. DRATEL: Well, Your Honor, first of all, some of the
9 language, rhetorical, is religious language. And there's an
10 article that came out very recently, so which -- they
11 interviewed people, and they gave them verses, scriptural
12 verses that have violence in them, and almost everyone thought
13 they were from the Koran. They were all from the Bible.

14 THE COURT: There are definitely people who believe the
15 Bible who also are violent.

16 MR. DRATEL: No, no, that's not what I'm talking about.

17 THE COURT: I'm not saying it's because of the Koran.

18 MR. DRATEL: Religious rhetoric, which is what a lot of
19 these things are -- we talk about spilling blood and all that.
20 It's all religious rhetoric, which doesn't necessarily
21 translate to actual conduct. And it hasn't translated to
22 actual conduct.

23 (Indiscernible) on the tapes when they said -- when he
24 says -- I mean, when he says "Even if I were to do that, even
25 if that was my intention," why is that not dispositive? Why,

1 when he says, "Why would they think that? It doesn't make
2 sense." Why is that not dispositive?

3 You can't parse it out in a way that makes it one or the
4 other. The tapes are ambiguous; there's a lot of ambivalence;
5 there's a lot of going back and forth.

6 They said -- there's cases say he didn't go to Al-Nusrah
7 Front, even in Turkey, they're claiming. The government's
8 claiming that's what it means. So how is that not a more
9 powerful indication?

10 Also, in terms of threats, there is no violence. The
11 government left him alone for all this time. The government
12 had these conversation. They listened to them in real time.
13 This is an intelligence wire tape. This is not -- they're all
14 in English. This is an intelligence wiretap. They listen to
15 them ongoing.

16 The government, at 4:00 o'clock that day, knows he's
17 going to be on a plane. They don't go until the passenger
18 says, "Oh, because -- you know, he's acting funny." That's
19 when the FBI shows up.

20 So the government itself didn't see danger in any of
21 these comments. They did not act. That is the ultimate proof
22 that they are not to be seen as a clear and convincing evidence
23 of danger. Because all the government needed was probable
24 cause. And they couldn't even get that far, based on all of
25 those statements in all of the tapes.

1 Again, also the court is full of family and friends. In
2 terms of -- and particularly in the context of risk of danger
3 and even risk of flight, it goes to both of these, you know.

4 And also, also, the other -- the other part of this is
5 we've had six months of a very controlled experiment as to what
6 he is like. There's not a single incident in jail.

7 And that raises another issue, which is really, to me,
8 outrageous. That all of a sudden, when this case now becomes
9 public and we have a bail hearing, he's in solitary
10 confinement, brought in in shackles, which I think is
11 outrageous --

12 **THE COURT:** So, Mr. Dratel, just to let you know, the
13 conditions of confinement are separate from the bail
14 consideration. So I'm trying to keep focused on risk of flight
15 and danger to the community.

16 I understand your outrage about that, but I'm going to
17 try to put that aside.

18 I can guess, I can guess -- I thought about that.
19 Because I realized how upset, you know, Mr. Shafi and his
20 family probably were when that happened.

21 My guess, without any other information, is that once the
22 information became public, the correctional officials
23 probably --

24 **MR. DRATEL:** No.

25 **THE COURT:** -- wanted to separate him out --

1 **MR. DRATEL:** No.

2 **THE COURT:** -- for his own safety.

3 **MR. DRATEL:** No, they didn't, Your Honor.

4 **THE COURT:** That's my guess.

5 **MR. DRATEL:** They didn't.

6 **THE COURT:** Okay.

7 **MR. DRATEL:** I'll tell you why. For two reasons. One is
8 they asked him, and he said no.

9 **THE COURT:** It's not up to him.

10 **MR. DRATEL:** But I can give you the second part too, the
11 second part too.

12 There was an incident involving something public about
13 terrorism months ago, while he was already in. They took him
14 for a day. Didn't change his uniform, didn't shackle him.
15 That was protective custody.

16 This is not protective custody. This is onerous.

17 **THE COURT:** Oh, no. I'm talking about when the complaint
18 wasn't sealed and the press got wind of this and it was
19 actually in the local papers. That timing seemed to coincide
20 with Mr. Shafi's placement into solitary confinement.
21 That's my guess. I could be wrong.

22 **MR. DRATEL:** That isn't a basis for it. And they did it
23 before when there was a situation where they thought there
24 might be danger to him. They put him in protective custody for
25 a day.

1 But also, for the reason that it's relevant to bail, is
2 that it's impossible to prepare a case with someone in solitary
3 confinement. I've done it too often. It is not possible.
4 They took his legal papers. This is something where he's going
5 to be at the mercy of the most arbitrary and capricious
6 authority that is going to interfere demonstrably with three
7 things: Our ability to get to see him on a regular basis in a
8 way that makes sense; second is his ability to independently
9 review everything and prepare; and third is the affects of
10 solitary confinement are demonstrably deleterious to everyone
11 who goes through it.

12 We put in a lot of the literature, and it's -- it's
13 incontrovertible.

14 And what you have is someone who doesn't deserve to be
15 there, who's going to be there -- really should be out on bail.
16 That's what I'm saying. It's going to interfere -- it's going
17 to continue to interfere with our ability to prepare the case.

18 So I think it is relevant in the sense that that's what
19 the solution is going to be for the government to try to make
20 the case more difficult. I think the solution for a case where
21 even pretrial says there are conditions, then I think there are
22 conditions. And certainly there are -- the issue that we're
23 facing is really not about whether there are conditions, it's
24 whether there are no conditions that would assure the Court.

25 So it's really reversed. And it's still the

1 (indiscernible), it a presumption case. It's still the
2 government's burden.

3 So in the context of --

4 MS. KELLY: Your Honor, I'm sorry to interrupt, but I
5 actually -- if the Court is interested, I can, just on the
6 question of the --

7 THE COURT: The solitary confinement.

8 MS. KELLY: -- the solitary confinement, I do have --

9 THE COURT: Please.

10 MS. KELLY: -- information on that.

11 THE COURT: Please.

12 MS. KELLY: Which is that the case agent who is not in
13 court today, another agent on the case, is here, was contacted
14 by the prison -- Glenn Dyer, and they informed the case agent
15 that they had, on their own -- and they have every -- you know,
16 right and reason to -- they had done a search of Mr. Shafi's
17 cell when he was out of the cell. They had found papers that
18 they thought were of concern. They called the national
19 security expert, the agent, and during that conversation they
20 told the agent that when the case became public there were
21 people -- there were other inmates on the floor who had made
22 comments.

23 And one that I remember that was repeated to me -- and
24 again, this is from the Glenn Dyer deputy to the case agent to
25 me, so if something's lost -- but the comment was, "Not all

1 federal prisoners are patriots."

2 And based on that comment -- and Glenn Dyer, as you know,
3 is a local facility which has some federal prisoners -- they
4 thought -- they decided to put him in administrative
5 segregation for his own safety.

6 And that is my understanding of how that happened.

7 And I don't know -- it is not up to me and it is not up
8 to the FBI as to how long that lasts. But that's just to
9 clarify what the circumstances were that led to those events.

10 **THE COURT:** And just so I can understand, there's no such
11 thing as solitary confinement at Glenn Dyer; it's just
12 administrative segregation. I've been there. I've actually
13 physically toured the facility and I understand what the
14 different levels of security are.

15 So I think the term "solitary confinement" is incorrect.
16 I think administrative segregation, for a number of reasons,
17 people who are kept at Glenn Dyer jail are separated out into
18 administrative segregation, sometimes for their safety,
19 sometimes for other reasons.

20 I do understand that if it's a problem in having --
21 presenting a criminal defense, that you can come back to me and
22 we can talk about it. Because I don't want that to happen in
23 any way, shape, or form.

24 But I think the term "solitary confinement" is probably a
25 misnomer in this situation.

1 So I wasn't sure where Mr. Shafi was being held, but if
2 it's Glenn Dyer I am familiar with that facility and I
3 understand what the administrative segregation is. It's
4 different. It's different.

5 **MR. DRATEL:** Well, also, Your Honor, probably the greater
6 violation is the search of his cell, the reading of his
7 privileged papers, and then sharing it with case agents.

8 We'll get to that at a different time. That's not for
9 today.

10 **THE COURT:** Okay. So can I ask -- Ms. Kelly, can I ask
11 you a question about the tape-recordings? The people who
12 Mr. Shafi is recorded talking to are not identified in the
13 tape-recording.

14 **MR. DRATEL:** Right.

15 **THE COURT:** Is that public information or is that sealed
16 information.

17 **MS. KELLY:** At this time, Your Honor, they are only
18 identified in the complaint affidavit -- in the public record.
19 They are only identified as -- by their initials, S.K. and A.N.

20 **THE COURT:** Okay. And Mr. Dratel, let me ask you a
21 question. Have the sureties heard the tape-recordings?

22 **MR. DRATEL:** They are familiar with what's in the
23 complaint. The tape-recordings were under a protective order
24 until very recently. But if you wanted them to listen to them,
25 they could listen to them.

1 **THE COURT:** I just wanted to see if they had.

2 **MR. DRATEL:** It's really not about that. It's really
3 about what are the conditions that will assure that the Court's
4 concerns will be met and --

5 **THE COURT:** Let me tell you what one of my concerns is.
6 It appears from the tape-recordings that there are other people
7 that Mr. Shafi is close to, perhaps even related to, very close
8 to. If he's released, those people who expressed the same
9 belief system that he did about leaving this country and
10 joining ANF, I don't know how to identify them and keep them
11 away from Mr. Shafi.

12 And that's actually one of my biggest concerns, from
13 listening to the tapes, is that there seem to be several people
14 who shared the same belief system. I don't know if they're
15 still around; I don't know who they are.

16 **MR. DRATEL:** Two of them are not family members, so that
17 is an issue that --

18 **THE COURT:** But one of them is.

19 **MR. DRATEL:** -- we're not going to have to worry about.

20 I understand. But also, the point is that he is going to
21 be -- if the Court were to impose these conditions, under home
22 confinement we could have a chaperon, an adult chaperon. The
23 family is willing to commit full time, either Mr. Shafi or
24 Mrs. Shafi. His father and his mother will be there every
25 minute of the day, every second with him.

1 And, you know, the government making that the family was
2 in -- we're not asking that the family is. Pretrial services
3 is. This is something that we do all the time. We don't leave
4 people in the custody of their families if we want to impose
5 strict conditions. Those home confinement, electronic
6 monitoring, Internet access restrictions, strict reporting by
7 telephone, custodianship, those are all elements that are done
8 by the court, not by the family.

9 Nobody's asking the family to be the ultimate
10 responsibility. The responsibility is the system to impose
11 those conditions. I think they're all available.

12 **THE COURT:** I think my concern -- I think my concern is
13 that there are other people living in the home --

14 **MR. DRATEL:** We'll resolve that, Your Honor.

15 **THE COURT:** -- that he would be living --

16 **MR. DRATEL:** I prefer --

17 Your Honor, there are reasons why it's hard to do that on
18 the public record. And it has to do with --

19 **THE COURT:** Would you like to seal the courtroom and have
20 a more candid discussion?

21 **MR. DRATEL:** If --

22 **THE COURT:** Ms. Kelly, how do you feel about that?

23 **MS. KELLY:** With respect to this one individual, I think
24 that at this point the case is unsealed and the public has a
25 right to know.

1 And I think that the other thing is, as the Court has
2 pointed out, there are, you know, numerous letters which were
3 all written before anyone could even have read the complaint.
4 And certainly the sureties perhaps, between last Thursday when
5 the complaint was unsealed and their interview with pretrial,
6 have been able to see it.

7 But they're all very close, you know. They're uncles and
8 aunts. So I think that it is very important that this case
9 remain public.

10 At the same time, the government, for the same reason
11 that we used vague terms as "relative" and initials, the
12 Court -- the government has a concern about the safety, and I
13 don't think it's appropriate to name those individuals.

14 **THE COURT:** Mm-hm. And is defense counsel aware of the
15 identities or --

16 **MR. DRATEL:** Yes.

17 **THE COURT:** Okay.

18 **MR. DRATEL:** But also, Your Honor, I had a technical
19 issue with it, which apparently is not the case, so I just
20 resolved that. So.

21 **THE COURT:** Okay.

22 **MR. DRATEL:** But if the Court -- I mean, it's a -- if the
23 Court wants that family member to live somewhere else, we'll do
24 that. There are other family members, there are aunts, uncles,
25 cousins. That can be done. That can all be -- I mean, this is

1 a -- as the prosecutor laid out, this is a family that wants
2 this to work. They're willing to do anything. And the Court
3 can impose almost anything.

4 THE COURT: Okay. So this is what I'm going to do. I'm
5 going to take a short break for ten minutes and I'll come back
6 and the court will be in recess and then we'll come back and
7 I'll (indiscernible.)

8 MR. DRATEL: Thank you.

9 THE COURT: Thank you.

10 MR. DRATEL: Your Honor, may I just add one thing -- I
11 apologize --

12 THE COURT: Yes.

13 MR. DRATEL: -- with respect to something in the
14 government's papers that I didn't get a chance to address,
15 which is the issue of the case in Missouri, the Harcevic case?

16 THE COURT: Mm-hm.

17 MR. DRATEL: The Harcevic situation is an example of
18 working. He's out on bond, home confinement, it's all working.
19 The other defendant --

20 THE COURT: Just so I understand, the government said
21 that he had not tried to actually leave the country to join any
22 groups.

23 MR. DRATEL: He sent money for a violent act.

24 THE COURT: He physically did not try to leave the
25 country.

1 **MR. DRATEL:** Right. But I don't know that it was a --
2 that the issue is just risk of flight. Because risk of flight,
3 pretrial services says, should not be an issue here. I think
4 there are conditions that will resolve it.

5 **THE COURT:** I think pretrial services, as I read it, said
6 there was a risk of flight and they were concerned.

7 **MR. DRATEL:** Well, it says -- it says although pretrial
8 services believes that a combination of conditions may possibly
9 be fashioned and it talks about mental health. So.

10 But the other part is that the person who the government
11 raises, Rosage [phonetic], in that case, had -- you know, the
12 reason for denying bail in that case were quite different in
13 that he had been -- he had prior assault arrest, he had been
14 sentenced for 60 days and three of probation, he was sentenced
15 to a year, after violating the probation, he had a domestic
16 violence charge, he violated the order of protection in that
17 domestic violence case, he's used an alias, has a history of
18 failing to appear in court, has violated prior -- I'm reading
19 now from actually the opinion by the magistrate judge.

20 So it's a very different situation. We think Harcevic is
21 a far more -- is far more cognate for this in terms of where
22 the bail statute ought to come out.

23 **THE COURT:** Okay.

24 **MR. DRATEL:** Thank you.

25 **THE COURT:** All right. So we're going to take a short

1 recess and we'll be back in ten minutes. Okay?

2 **MR. DRATEL:** Thank you.

3 **MS. KELLY:** Thank you, Your Honor.

4 (Recess from 2:48 P.M. to 2:57 P.M.)

5 **THE CLERK:** We are back on the record in the matter of
6 United States versus Adam Shafi. 15 CR 582.

7 **UNIDENTIFIED MALE SPEAKER:** If I could have just one
8 minute. Let me find Mr. --

9 **THE COURT:** That's no problem. Okay.

10 (Brief pause.)

11 **THE COURT:** We're back on the record in the matter of
12 Adam Shafi. And this is Case No. 15-cr-00582-WHO.

13 And thank you for being patient with me. I did go back
14 and think very seriously about, you know, whether or not I
15 could impose any conditions that would mitigate the risk of
16 flight and also danger to the community. And I've come to the
17 conclusion that I cannot. I think the risk of flight is
18 actually what I'm most concerned about. And one of the reasons
19 is that there are other individuals who have been talking to
20 Mr. Shafi about also going to the Middle East and joining ANF,
21 and I don't have any control over those people, I don't know
22 who they are, I don't have a way of making sure they're not
23 working with him, once he is released, to have him leave the
24 country.

25 And I know there are some mitigating factors that can be

1 put into case, and he has a loving family who is doing
2 everything they can, and I'm very sorry for them because I know
3 that they're trying very hard.

4 But I think in this situation, given the unknowns, it is
5 too difficult. I can't impose conditions that would mitigate
6 the flight of risk. And because this is a presumption case, I
7 think that the defendant, you know, the government has shown
8 there was a risk of flight and that I don't believe there are
9 any conditions that can be placed to reduce that.

10 And so Ms. Kelly, can you prepare a proposed order for
11 me?

12 MS. KELLY: I will, Your Honor.

13 THE COURT: All right. Thank you. And do we need to set
14 a date before the district judge, Wanda?

15 MS. KELLY: We do, Your Honor.

16 THE CLERK: I believe so, yes.

17 THE COURT: This is in front of Judge Orrick?

18 THE CLERK: It's Judge Orrick.

19 MR. DRATEL: Yes.

20 MS. KELLY: Your Honor, the parties spoke before court
21 and I know that Mr. Dratel, who is -- comes in for New York for
22 these appearances, has asked -- and the government has no
23 objection -- to, if the Court -- if Judge Orrick's calendar is
24 available, January 14th.

25 And we also agree that there is a basis for exclusion of

1 time for whatever period of time for effective preparation of
2 counsel.

3 THE COURT: Okay. Why don't you fill out the paperwork
4 also, then.

5 MS. KELLY: We have done that, Your Honor.

6 THE CLERK: Yes. January 14th at 1:30.

7 MS. KELLY: I'll just enter that date, Your Honor, and
8 then ask -- or Mr. Dratel has already (indiscernible.)

9 THE COURT: Signed it. Okay. Thank you.

10 And I will also tell you, Mr. Dratel, that if you were
11 concerned about your inability to get access to your client or
12 inability for him to review legal papers, you can bring that
13 issue before me, I'll discuss it with the US Marshal and make
14 sure that he gets additional -- gets the right assistance.

15 But I want to assure you he is not in solitary
16 confinement. Administrative segregation is very different from
17 solitary confinement. I'm familiar with the issues regarding
18 solitary confinement and I agree that long term solitary
19 confinement is not good for people's mental health, although it
20 may be necessary in some circumstances. But that's not what
21 Mr. Shafi is placed in right now.

22 So I just want to make sure that you have a clear
23 understanding of that because I understand you're not from this
24 area and you don't know the Glenn Dyer facility.

25 MR. DRATEL: Yes. Thank you, Your Honor.

1 **THE COURT:** Okay. Thank you.

2 **MS. KELLY:** Thank you, Your Honor.

3 **THE CLERK:** All right. Court is in recess.

4 **THE MARSHAL:** Remanded?

5 **THE CLERK:** Yes.

6 **THE COURT:** The defendant is remanded to the custody of
7 the US Marshal.

8 (Proceedings adjourned at 3:01 P.M.)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE OF CONTRACT TRANSCRIBER

I, Kelly Polvi, CSR, RMR, FCRR, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further, that I am not financially nor otherwise interested in the outcome of the action.

Dated December 24, 2015.

A handwritten signature in cursive script that reads "Kelly Polvi".

Kelly Polvi, CSR #6389, RMR, FCRR
Contract Transcriber

*Kelly Polvi, CSR, RMR, FCRR
P.O. Box 1427
Alameda, CA 94501
(503) 779-7406; kpolvi@comcast.net*